93-383

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

PABLO ROJAS-HOLGUIN,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, where a court imposing a sentence under the Federal Sentencing Guidelines determines that a defendant has earned a downward adjustment of the offense level for acceptance of responsibility, it is a violation of due process and of the Guidelines to deprive him of the benefit of that adjustment through the application of upward adjustments that, although technically applicable, can have no sentencing consequence as a matter of law.

2. Whether a federal sentencing court is required under Sec. 1B1.3 of the Federal Sentencing Guidelines to treat as relevant conduct unadjudicated criminal conduct that is distinct from the federal offense and is the subject of a contemporaneous state prosecution where the federal accusatory instrument reflects an intention to avoid dual prosecution for the same offense.

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No. _____

In The

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PABLO ROJAS-HOLGUIN,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pablo Rojas-Holguin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed the judgment and sentence of the United States District Court for the Eastern District of New York (Dearie, D.J.). Petitioner was convicted on his plea of guilty to a one count information charging him with conspiracy to possess and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to a term of imprisonment of forty years.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on June 7, 1993 upon the denial of a timely petition for rehearing, and is reproduced in the Appendix at App. 1. The Court of Appeals' opinion, issued on April 5, 1993, is reproduced in the Appendix at App. 3, and is officially reported sub nom *United States v. Caceda* at 990 F.2d 707 (2d Cir. 1993).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

21 U.S.C. § 841 provides in pertinent part,

> (a) . . . [I]t shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;
>
> (b) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(B) In the case of a violation of subsection (a) of this section involving –
>
> (ii) 500 grams or more of a mixture or substance containing a detectible amount of (II) cocaine . . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . .

21 U.S.C. § 846 provides in pertinent part,

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines") § 1B1.3 provides in pertinent part,

(a) Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant; and

(1)(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping

of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

§ 3B1.1 of the Guidelines provides in pertinent part,

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

§ 3E1.1(a) of the Guidelines provides as follows:

If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

STATEMENT OF THE CASE

In March of 1990 petitioner was indicted by an Eastern District of New York grand jury for his part in the sale of 37 kilos of cocaine to an undercover agent on February 28, 1990. A few weeks thereafter, petitioner

pleaded guilty to a one-count superseding information charging him with conspiring to possess and to possess with intent to distribute in excess of 500 grams of cocaine. The conduct underlying that charge was Mr. Rojas' participation in the 37 kilo deal on February 28, 1990:

> On or about February 28, 1990, within the Eastern District of New York and elsewhere, the defendant Pablo Rojas-Holguin and others did knowingly and intentionally conspire to distribute and to possess with intent to distribute an amount in excess of five hundred (500) grams of a substance containing cocaine . . .

Prosecutor's Information, reproduced in the appendix in the Court of Appeals at A-4.

During the same period petitioner, who had been the subject of a separate state investigation for several months, was indicted by a New York State grand jury and charged with conspiracy to possess with intent to sell and possession with intent to sell over three thousand kilograms of cocaine. The period of the conspiracy identified in that indictment was "from in or about the month of February 1990 to March 1, 1990." Significantly, in spite of the temporal identity between the acts underlying the state and federal indictments, none of the acts constituting the federal charges were referred to in the state indictment.

The federal prosecutors were well aware of the allegations forming the basis of the state indictment. Indeed, during a post-arrest search of the apartment of petitioner's co-defendant in this case, one Gladys Sterling-Escandon, the federal agents discovered a ledger, concededly prepared by petitioner, which reflected the

receipt and distribution on credit of approximately 3,166 kilograms of cocaine during the period between January of 1990 and February 21, 1990.

Obviously coordinating their efforts, the federal and state prosecutors went to great lengths to keep the two prosecutions distinct. For reasons best known to them, they apparently decided that the federal indictment would be limited to the 37 kilo transaction while the state indictment would embrace the broader conspiracy reflected in the ledger. Thus, the state prosecutor argued against petitioner's motion to dismiss the state indictment:

> The federal prosecution was based on a single transaction conspiracy to sell 37 kilos of cocaine on February 28, 1990 to an undercover drug agent. The object crime, if pleaded in state court, was the actual sale and possession of 37 kilos . . .
>
> The state indictment does not include this transaction or this crime, nor is this conspiracy a part of the State's conspiracy charge against Defendant.

The state court denied petitioner's motion.

During his federal guilty plea petitioner was advised that the maximum sentence for the offense was forty years, but he was specifically informed that the sentence ultimately to be imposed would be determined by application of the Sentencing Guidelines. As the sentencing judge was later to observe, petitioner "honestly and truly believed he was going to do a minimum of 120 to 151

months and he took the plea on that basis".[1] However, in calculating the offense level, the probation department, under the rubric of "relevant conduct", factored the quantity of cocaine that was the subject of the still-pending state indictment, resulting in an unadjusted offense level of 42. The guidelines range at that level was 360 months to life imprisonment, fully encompassing the forty-year statutory maximum sentence for petitioner's offense.

In spite of the fact that any upward adjustment to the offense level could have no effect on the sentence, the pre-sentence report suggested a four-level enhancement on the basis of petitioner's managerial role in the offense, citing § 3B1.1(a) of the Guidelines. The result was an adjusted offense level of 46, three levels beyond the highest enumerated in the Guidelines. At that point, the pre-sentence report awarded petitioner a two-level reduction for his acceptance of responsibility under 3E1.1 of the Guidelines, resulting in a net offense level of 44, one point higher than the highest level enumerated in the guidelines, with a sentencing range of life imprisonment.

Petitioner posed several objections to this shocking turn of events. First, he argued that because it was the subject of the still-pending state indictment, for which petitioner faced mandatory life imprisonment under state law, the additional drug quantity should not be included as "relevant conduct". Alternatively, he suggested that

---

[1] The base offense level under the guidelines for 37 kilograms of cocaine, after adjustment for acceptance of responsibility, was 32 with a sentencing range of 120 to 151 months of imprisonment.

the existence of the separate state prosecution was a proper basis for the court to downwardly depart from the otherwise applicable forty-year sentence. Finally, petitioner suggested since the base offense level was already at the highest point permitted under the guidelines, there was no purpose to be served by upwardly adjusting it "off the guidelines grid". To do so, urged counsel, would deprive petitioner of the benefit of the acceptance of responsibility reduction under 3E1.1.

Pained as he was to do so, Judge Dearie rejected each of petitioner's suggestions, concluding that he didn't have "the power or authority to rewrite them [the guidelines]. If I did, the sentence would be different. It would be very substantial, but very different" and "[W]hat it all adds up to is my sense that a sentence of 40 years' imprisonment is far more than and substantially in excess of what is reasonably required, given the gravity of the crime, the extensiveness of the activity, and the individual and my sense of him as a person. **But that's my judgment. And unfortunately, I'm really not entitled to make it these days."**

On appeal, petitioner renewed the arguments he had posed at sentencing. In addition, he argued that Judge Dearie had misapplied the guidelines by failing to recognize his authority to downwardly depart. The Court of Appeals affirmed.

The Court rejected the double punishment argument as "not ripe for review", relying on *United States v. Perdomo*, 927 F.2d 111 (2d Cir. 1991), in which that Court had "concluded that a sentencing court should not consider

the outcome of **possible** subsequent prosecutions. Resolution of the double-punishment issue must properly await the second prosecution, if any." App. at 5. "[C]onsideration of quantities that are only **potentially** the subject of state prosecution follows a fortiori", the Court ruled. *Ibid.* at 6 (emphasis added).

Secondly, the Court of Appeals found that Judge Dearie had refused to downwardly depart "only on prudential grounds, not on any supposed lack of authority." *Ibid.* at 6.

Finally, the Court held that a downward adjustment for acceptance of responsibility must be made "from the total of the offense level even if that total exceeds 43" notwithstanding that doing so deprives the defendant of the value of the downward adjustment. *Ibid.* at 6-7.

REASONS FOR GRANTING THE WRIT

ARGUMENT

POINT I

WHERE A COURT IMPOSING A SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES DETERMINES THAT A DEFENDANT HAS EARNED A DOWNWARD ADJUSTMENT OF THE OFFENSE LEVEL FOR ACCEPTANCE OF RESPONSIBILITY, IT IS A VIOLATION OF DUE PROCESS AND OF THE GUIDELINES TO DEPRIVE HIM OF THE BENEFIT OF THAT ADJUSTMENT THROUGH THE USE OF UPWARD ADJUSTMENTS THAT, ALTHOUGH TECHNICALLY APPLICABLE, CAN HAVE NO SENTENCING CONSEQUENCE AS A MATTER OF LAW.

The Probation Department, Judge Dearie and the Government each recognized petitioner had earned a

two-point downward adjustment under § 3E1.1 for having accepted responsibility for his offense. For petitioner, such an adjustment meant going from level 43 with a mandatory sentence of 40 years[2], to level 41 with a range of 27-33¾ years (324-405 months), a thirteen year difference at the lower end of the range. However, because the adjustment was applied only after a three-point upward adjustment for his alleged role in the offense, so that the *net* offense level remained at 43, petitioner was completely deprived of any benefit from his acceptance of responsibility.

The Court of Appeals' response to petitioner's objection to this bizarre, cruel and unintended result was the following statement:

> We believe it evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43. Otherwise, a more culpable offender, say, a defendant whose conduct would yield a level of 50 who was entitled to a downward adjustment of 2, would receive a total offense level of 41, while a less culpable defendant with a level of 43 and no applicable upward or downward adjustments would get a higher sentence. We decline to read the Guidelines to compel that perverse result.

App. at 6.

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[2] When the guidelines range exceeds the statutory maximum, the statutory maximum becomes the guidelines sentence. In this case, the guidelines range at level 43 is life imprisonment, but since the statutory maximum for petitioner's offense is forty years, the latter became the guidelines sentence.

What the Court found "perverse", however, is nothing of the sort because it is fully consistent with the intent underlying the acceptance of responsibility adjustment. To begin with, when the base offense level is already at the highest permissible under the guidelines, upward adjustments are without sentencing consequence and therefore functionally irrelevant. This is because, as the Court of Appeals noted, "Application Note Two of the Commentary to the Sentencing Table states that 'an offense level of more than 43 is to be treated as an offense level of 43." App. at 6. Thus, the result the Court of Appeals found "perverse" is actually mandated by the guidelines because an offender with a total offense level of 50 falls in precisely the same sentence range as the "less culpable" offender with a total offense level of 43. Given this limitation, then, an upward adjustment of the maximum base offense level is a useless exercise. Thus, in this case, the upward adjustment for petitioner's alleged managerial role in the offense could add nothing to the sentencing determination.

But the guidelines also mandate that an offender, even one at the highest levels of culpability, is entitled to a two-point reduction if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct". § 3E1.1. Thus, even a "Career Offender" who otherwise is subject to a sentence of imprisonment "at or near the maximum term authorized" (Application Note 2, § 4B1.1) is entitled to a two-point reduction under § 3E1.1. See § 4B1.1. See also, *United States v. Rogers*, 972 F.2d 489, 494 (2d Cir. 1992):

> Indeed, the amendment of the Guidelines to indicate that a career offender was eligible for a

> § 3E1.1 adjustment for acceptance of responsibility suggests that the Commission agrees that **acknowledgement of guilt should be considered at sentencing, regardless of a defendant's criminal history.**

As recognized by the Court in *Rogers* and in the Guidelines themselves, the § 3E1.1 adjustment takes into account, not an offender's diminished culpability, but

> "legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense and related conduct by taking in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility."

"Background", § 3E1.1.

Clearly, under the guidelines' rationale the offender in the Court of Appeals' example with a total offense level of 50 who qualifies for a 3E1.1 adjustment **is entitled to** a lower sentence than the one with an offense level of 43 who doesn't qualify for the same adjustment.

Here, no one disputed that petitioner was entitled to the adjustment under § 3E1.1, and in fact, it was "awarded". But the award became an empty gesture in the face of the irrelevant upward adjustment. There is nothing in the Guidelines that compelled this result. Quite to the contrary, given the strong policy considerations underlying it, the acceptance of responsibility adjustment cannot be denied to a defendant by the

mechanical application of other provisions of the guidelines.

Petitioner respectfully submits the Court of Appeals' decision on this issue seriously undermines an important provision of the Guidelines. This Court should exercise its supervisory authority to correct the error.

POINT II

A FEDERAL SENTENCING COURT IS NOT REQUIRED UNDER SEC. 1B1.3 OF THE FEDERAL SENTENCING GUIDELINES TO TREAT AS RELEVANT CONDUCT UNADJUDICATED CRIMINAL CONDUCT THAT IS DISTINCT FROM THE FEDERAL OFFENSE AND IS THE SUBJECT OF A CONTEMPORANEOUS STATE PROSECUTION WHERE THE FEDERAL ACCUSATORY INSTRUMENT REFLECTS AN INTENTION TO AVOID DUAL PROSECUTION FOR THE SAME OFFENSE.

Section 1B1.3 of the guidelines directs that in determining the base level for the offense of conviction, a sentencing court must consider all acts and omissions committed by the defendant or those "for which the defendant would be otherwise accountable". Application Note 1 of that section advises that where there is concerted activity, such as in a conspiracy, accountable conduct includes "conduct of others in furtherance of the jointly undertaken criminal activity that was reasonably foreseeable by the defendant".

Here, the district court did not confine petitioner's relevant conduct to his participation in the conspiracy charged in the federal indictment, to which he pleaded guilty, but also embraced the unadjudicated conduct

which was the basis of the state's then-pending prosecution. As a result, Mr. Rojas' base offense level jumped from level 34, calling for a sentencing range of 121 months to 151 months, to level 42, mandating a sentencing range of 360 months to life.

This anomalous result is in direct contravention of the long-standing policy of the federal government not to prosecute for acts that are or have been the subject of state prosecution in the absence of some compelling factor. See *Petite v. United States*, 361 U.S. 529, 530 (1960). As this Court observed in *Rinaldi v. United States*, 434 U.S. 22, 27 (1977):

> In response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power, the Justice Department adopted the policy of refusing to bring a federal prosecution except when necessary to advance compelling interests of federal law enforcement. The Petite policy was designed to limit the exercise of the power to bring successive prosecution for the same offense to situations comporting with the rationale for the existence of that power. Although not constitutionally mandated, this Executive policy serves to protect interests which, but for the "dual sovereignty principle inherent in our federal system, would be embraced by the Double Jeopardy Clause. In light of the *parallel purposes of the Government's Petite policy and the fundamental constitutional guarantee against double jeopardy*, the federal courts should be receptive, not circumspect, when the Government seeks leave to implement that policy.

Emphasis added.

Here, fully aware of the conduct alleged in the state indictment, the government brought federal charges that in all respects were separate and distinct from those in the state case. The limited scope of the federal indictment, i.e., a one-day conspiracy with the discrete objective of distributing 37 kilograms of cocaine, reflected the government's continued adherence to the *Petite* policy and its intention to apply it to this case. However, the application of the "relevant conduct" provision of the guidelines utterly defeated that policy by making the conduct underlying the pending state charges the most significant part of the federal prosecution.

The Court of Appeals did not address this obvious tension between the important considerations underlying the *Petite* policy and § 1B1.3 of the guidelines. Instead, the Court deemed the issue "not ripe for review", relying on its decision in *United States v. Perdomo, supra.* But the Court's reliance on *Perdomo* is utterly misplaced. In that case, the defendant objected to the inclusion of an uncharged but similar offense to his offense level calculation, suggesting that since the government **could and might** indict him for that offense at a later date he would be subjected to double jeopardy. This Court opined that the argument had "considerable force, because double jeopardy includes the right not to be punished twice for the same offense." However, noting that "**to date a second indictment has not been returned** against Perdomo for the [other offense] included by Judge Billings in calculating his sentence on this indictment", the Court concluded that "resolution of this issue must properly await the second prosecution, if any." 927 F.2d 116. (Emphasis added)

The scenario in this case is precisely the opposite. Here, the second prosecution for the uncharged offense included in petitioner's sentence was not merely "potential", **it was pending at the time of his sentence.** Indeed, the state court had already denied petitioner's motion to dismiss that indictment on state double jeopardy grounds. Moreover, the state charges carried mandatory life imprisonment and precluded plea bargaining, so that severe *state* punishment for the offense was a virtual certainty. In the face of these facts, acknowledged by the Court in the factual portion of its opinion (App. at 2), the Court's holding that a sentencing court may consider drug quantities "that are only **potentially** the subject of state prosecution" is, with respect, a non-sequitur.

Petitioner respectfully submits there is tension between the *Petite* policy of the executive branch of the government and the "relevant conduct" provisions of the sentencing guidelines. We further submit that the intention of the executive branch to implement its policy by a careful drafting of its accusatory instrument so as to avoid simultaneous federal and state prosecutions for the same offense may not be frustrated by the application of the state offense conduct to the federal sentence under "relevant conduct".

We believe this issue is of such importance to the enforcement of federal criminal laws and to the principles of double jeopardy as to be worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 2, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of June one thousand nine hundred and ninety-three.

THE UNITED STATES OF AMERICA,

Appellee

v

FERNANDO CACEDA,

Defendant,

PABLO ROJAS-HOLGUIN

Defendant-Appellant.

DOCKET NUMBER: 92-1328

(Filed, Jun. 7, 1993)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant Pablo Rojas-Holguin.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk

By: /s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 588 August Term, 1992

(Argued: December 2, 1992 Decided: APR 5 1993

Docket No. 92-1328

UNITED STATES OF AMERICA,
Appellee,

v.

FERNANDO CACEDA,
Defendant.

PABLO ROJAS-HOLGUIN,
Defendant-Appellant.

Before: OAKES and WINTER, *Circuit Judges,* and PRESKA, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York (Raymond J. Dearie, *Judge*) sentencing Rojas-Holguin for conspiring to possess and distribute cocaine. He challenges his sentence on various grounds, including the district court's allegedly improper consideration of relevant conduct and its calculation of offense level that is alleged to have deprived him of the value of a downward adjustment. He also claims to benefit from a post-sentence amendment to the Guidelines. We affirm.

---

* The Hon. Loretta A. Preska, U.S. District Judge for the Southern District of New York, sitting by designation.

MARTIN L. SCHMUKLER, New York, New York, (Domenick J. Porco, New York, New York, of counsel), *for Defendant-Appellant.*

PETER A. NORLING, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Susan Corkery, Assistant United States Attorney, Brooklyn, New York, of counsel), *for Appellee.*

WINTER, *Circuit Judge:*

Pablo Rojas-Holguin pled guilty to conspiring to possess and distribute cocaine and was sentenced on May 21, 1992. He appeals from the sentence imposed by Judge Dearie. We affirm.

Federal agents arrested Rojas-Holguin after he sold thirty-seven kilograms of 92 percent pure cocaine to an undercover agent. During the course of related searches, agents discovered a ledger in which Rojas-Holguin had detailed transactions involving 3166 kilograms of cocaine during a two-month period, as well as workers' salaries and expense information reflecting the activities of "stash houses." The ledger entries included various coded references, including cocaine coded "2H," the reference on the package of cocaine sold to the agent. While the federal prosecution was in progress, New York state authorities arrested Rojas-Holguin for selling 100 kilograms of cocaine. At the time of his federal sentencing, the state proceeding was pending.

Rojas-Holguin pled guilty to a count that related only to the 37 kilograms sold to the undercover agent. The presentence report took into account the 3166 kilograms of cocaine reflected in the ledger and calculated his base offense level at 42. It also recommended an upward adjustment of 4 based on his organizational role, *see* U.S.S.G. § 3B1.1(a) (1991), and a downward adjustment of 2 for his acceptance of responsibility, *see* U.S.S.G. § 3E1.1, resulting in a total of 44. This was one level above the maximum offense level of 43 set out in the Sentencing Table in Chapter Five of the Sentencing Guidelines.

Rojas-Holguin objected to the report's calculation of the quantity of narcotics involved, and Judge Dearie conducted a hearing to determine the proper quantity to be considered. At this hearing, Rojas-Holguin's attorney conceded that the uncharged conduct "would appear" to fall within the definition of relevant conduct and that the majority of the ledger entries were in Rojas-Holguin's handwriting. Drug Enforcement Agency Special Agent Jerome McArdle testified that the ledger included references to "Pablo," an alias for Rojas-Holguin. At the close of the hearing, Judge Dearie found that the uncharged conduct should be considered as part of the same conduct as the offense to which Rojas-Holguin pled guilty. He explained that "[i]t would defy common sense . . . to put the sort of blinders on [about the larger quantity of drugs involved]." Judge Dearie held that any possible double-punishment concerns must be raised only at the time of sentencing in state court, if that prosecution continued and was successful. Judge Dearie then found Rojas-Holguin to be a manager, *see* U.S.S.G. § 3B1.1(b), rather than an organizer. *See* U.S.S.G. § 3B1.1(a). He therefore

adjusted Rojas-Holguin's base offense level of 42 upward by 3 to 45 for that managerial role and downward by 2 for acceptance of responsibility. Arriving at an offense level of 43, Judge Dearie sentenced Rojas-Holguin to 40 years in prison.

Rojas-Holguin argues first that Judge Dearie erred in considering the 3166 kilograms of cocaine in addition to the 37 kilograms sold to the agent. However, Guidelines' Section 1B1.3(a)(2) states that the offense level shall be computed on the basis of "all . . . acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Judge Dearie found that the transactions reflected in the ledger were "part of the same course of conduct or common scheme or plan" as the sale to the agent. This finding is fully supported by the record. The ledger was kept by Rojas-Holguin, detailed his participation in drug activity, and included code references identical to the code on the cocaine sold to the undercover officer for which Rojas-Holguin had pled guilty. Contrary to Rojas-Holguin's argument, Judge Dearie was required to consider the uncharged quantities. *See United States v. Schaper*, 903 F.2d 891, 897 (2d Cir. 1990).

Rojas-Holguin's second contention is that the additional quantities should not have been considered because of the pending state proceeding, which, by the reasoning used with regard to taking the 3166 kilograms into account, might be part of the same course of conduct. However, in *United States v. Perdomo*, 927 F.2d 111 (2d Cir. 1991), we concluded that a sentencing court should not consider the outcome of possible subsequent prosecutions. "Resolution of [the double-punishment] issue

. . . must properly await the second prosecution, if any." *Id.* at 116. Essentially, "the issue is not ripe for review." *United States v. Koonce*, 885 F.2d 720, 722 (10th Cir. 1989), *cert. denied*, 112 S. Ct. 1695, and *cert. denied*, 112 S. Ct. 1705 (1992). In addition, under certain limited circumstances, the Guidelines treat conduct that has been the subject of a state prosecution that has resulted in a conviction and sentence as relevant conduct. *See* U.S.S.G. § 1B1.3 Application Note 7. Thus, consideration of quantities that are only potentially the subject of a state prosecution follows *a fortiori*.

Third, Rojas-Holguin argues that Judge Dearie should have exercised his discretion to make a downward departure. However, refusals of sentencing courts "to depart from the applicable Guidelines range [are] not appealable," *United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir.), *cert. denied*, 493 U.S. 998 (1989), unless the sentencing court mistakenly believed that it lacked the authority to depart. *See United States v. Sharpsteen*, 913 F.2d 59, 62-64 (2d Cir. 1990). Judge Dearie rejected possible downward departures only on prudential grounds, not on any supposed lack of authority.

Fourth, Rojas-Holguin contends that the court erred in adding an upward adjustment of 3 levels because that adjustment brought the level to 45, 2 levels above the highest offense level on the table, rendering his 2-level downward adjustment valueless. There appear to be no reported decisions on whether the calculation of upward adjustments must stop at level 43, while subsequent downward adjustments proceed from that point. The Guidelines are not helpful in resolving the issue. Application Note Two of the Commentary to the Sentencing Table

states that "[a]n offense level of more than 43 is to be treated as an offense level of 43." However, that does not answer the question of how one arrives at the final offense level. We believe it evident that downward adjustments must be made from the total of the base offense level plus upward adjustments even if that total exceeds 43. Otherwise, a more culpable offender, say, a defendant whose conduct would yield a level of 50 who was entitled to a downward adjustment of 2, would receive a total offense level of 41, while a less culpable defendant with a level of 43 and no applicable upward or downward adjustments would get a higher sentence. We decline to read the Guidelines to compel that perverse result.

Fifth, Rojas-Holguin argues that Judge Dearie relied on the quantity of drugs involved to calculate the base offense level and to conclude that the upward adjustment was warranted for Rojas-Holguin's role as a manager of the conspiracy. This dual reliance, he asserts, was impermissible "double-counting." However, we need not address whether the Guidelines permit the consideration of the quantity of drugs for the two different Guidelines calculations because there was no double-counting in this case. Judge Dearie did use the quantity of known or foreseeable drugs in the conspiracy to calculate Rojas-Holguin's base offense level. The upward adjustment for being a manager, on the other hand, was based on the fact that Rojas-Holguin maintained the ledger for "a higher authority." *Cf. Perdomo*, 927 F.2d at 116-17 (holding that defendant's role in the relevant conduct was includable in his sentencing determination).

Sixth, at oral argument Rojas-Holguin argued that his offense level should have been adjusted further downward because Guidelines' Section 3E1.1 was recently amended. As of November 1992, a Section 3E1.1 adjustment reduces offense levels by 3 points, rather than the 2-level adjustment in effect when Rojas-Holguin was sentenced. In essence, Rojas-Holguin is requesting the retroactive application of the 1992 amendment to Section 3E1.1.

However, according to 18 U.S.C. § 3582(c)(2), the "court may not modify a term of imprisonment once it has been imposed" unless "such a reduction is consistent with applicable policy statements" issued by the Sentencing Commission. 18 U.S.C. § 3582(c); *see also* 28 U.S.C. § 994(u)(2); *Braxton v. United States*, 111 S. Ct. 1854, 1858 (1991). In *United States v. Colon*, 961 F.2d 41, 46 (2d Cir. 1992), we held that, "[w]hatever the scope of § 3582(c)(2), it adequately indicates that Congress did not wish appellate courts on direct review to revise a sentence in light of changes made by the [Sentencing] Commission after the sentence has been imposed." *Colon*'s holding was based on the Guidelines' policy statement articulating a general rule that "*a reduction* in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement." U.S.S.G. § 181.10(a) (emphasis added). Only certain enumerated amendments are specified by the Guidelines as exceptions to the general rule that amendments are not to be applied retroactively even though appellate review has not been concluded. *See* U.S.S.G. § 1B1.10(d) (1992) (referring to amendments listed in Appendix C that are retroactively applied). Section

1B1.10(d) does not include the 1992 amendment to Section 3E1.1 in its list of retroactive amendments. As in *Colon,* the pertinent amendment "is not among those explicitly stated to be retroactive by the Sentencing Commission," and should not be applied retroactively. 961 F.2d at 46.

We therefore affirm.